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China Employment Law Update

Newsletter

April 2018

In This Issue:

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China implements social security treaty with Spain

In March, the Ministry of Human Resources and Social Security (MOHRSS) announced that China would implement the China–Spain Social Security Treaty starting from March 20, 2018.

According to the treaty, employees who are seconded to work in China by their employers in Spain may be exempted from making pension and unemployment insurance contributions in China, but they still need to make medical insurance contributions in China.

The exemption is not automatic. A secondee from Spain must submit to the PRC social insurance authority an official certificate issued by the Spanish social insurance authority that proves the secondee has been making social insurance payments in Spain. If the secondee cannot provide the certificate, the secondee will need to make social insurance contributions in China — the same as Chinese nationals.

The China–Spain Social Security Treaty is the eighth social security treaty implemented by China. The previous seven implemented treaties were with Germany, South Korea, Denmark, Canada, Finland, Switzerland and the Netherlands. China has also signed social security treaties with France and Luxembourg but has not yet officially implemented them.

Key take-away points:

In recent years, employees have become more aggressive in asserting their social insurance rights through administrative complaints and labor unrest. Social insurance survey results show that many employers are exposed to these risks by not complying with their social insurance contribution obligations. To avoid these complaints and labor unrest, employers should follow all rules in making social insurance contributions.

As for the China–Spain Social Security Treaty, any employer wishing to obtain social insurance exemptions for its secondees from Spain should consult with the local social insurance center as documentary requirements for the exemption may vary by locality, and oftentimes local authorities may not even have set procedures in place to handle exemption applications.

Special economic zone in Shenzhen exempts Hong Kong and Macao residents from work permit requirements

On March 19, 2018, the Administration Bureau of the Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone of Shenzhen Municipality ("**Qianhai Zone**") announced that the residents of Hong Kong and Macao working in the Qianhai Zone are exempt with immediate effect from the requirement to obtain a work permit. As such, Hong Kong and

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Macao residents can now be employed directly by Qianhai enterprises and enroll in social security and apply for tax subsidies without a work permit.

In addition to the work permit exemption, other preferential policies for Hong Kong and Macao residents have been implemented in the Qianhai Zone, which enable them to work and live there more easily. For example, Hong Kong and Macao residents who have worked in the Qianhai Zone can now enroll in the housing fund as Shenzhen citizens. In another example, to bring more talent to the Qianhai Zone, the Qianhai Zone will also allow more Hong Kong and Macao professionals, such as certified accountants, architects, social workers and certified tax agents, to practice there.

The Qianhai Zone reform is just the beginning. China is developing a planning framework for the Great Bay Area of Guangdong, Hong Kong and Macao, under which Hong Kong and Macao residents will gradually enjoy the same treatment as mainland Chinese in housing, education, transportation, etc. when working and living in the Guangdong bay area. Thus, the work permit exemption for Hong Kong and Macao residents may expand beyond the Qianhai Zone to those areas covered by the Great Bay Area plan.

Key take-away points:

The current work permit reform is limited to Hong Kong and Macao residents working in the Qianhai Zone. There is no clear timeline on when the exemption will expand to the Great Bay Area.

Supreme People's Court upholds work injury claim for employee's death while working at home

According to recent media reports, on November 29, 2017, the Supreme People's Court dismissed an appeal by the Haikou City Human Resources and Social Security Bureau disputing a lower court ruling that a teacher's death should be deemed as a work injury after the teacher died at home while working overtime.

On December 15, 2011, the teacher administered a test from 8:30 p.m. to 10:30 p.m. and began correcting the student examination papers that same night at home. The next morning, the teacher was found unresponsive at home and died at 9:30 a.m. after medical treatment failed.

On May 23, 2012, the Haikou bureau issued an administrative decision declaring that the teacher's death was not a work injury. The decision was upheld by the upper-level administrative authority.

The teacher's spouse filed a lawsuit in Haikou city. When the case reached the intermediate court, the court withdrew the administrative decision and ordered the Haikou bureau to issue a new decision. In response, the Haikou bureau merely affirmed its original decision. The teacher's spouse filed an additional lawsuit and both the intermediate court and the provincial high court ruled against the Haikou bureau. The Haikou bureau appealed to the Supreme People's Court.

In its argument, the Haikou bureau cited Article 15 of the Work-Related Injury Insurance Regulations, which states that an employee will be deemed to

have suffered a work-related injury if the employee dies immediately or within 48 hours after emergency treatment from a disease arising during working hours on the job. The Haikou bureau argued that the teacher's injury did not occur "during working hours" and did not occur "on the job" since the teacher died after returning home from work.

The Court stated that the most important factor to determine whether an injury happens "during working hours" and "on the job" is whether the employee is acting in the employer's interests when the injury is suffered. Thus, even if the employee is at home, working overtime for the employer's interests still satisfies the requirement "during working hours on the job."

In addition, the Court interpreted Article 15 to have expanded the scope of work injury by using the phrase "on the job" rather than the phrase "in the workplace." The Court further considered this interpretation to be consistent with the regulations' aim of better protecting employees.

Finally, the Court added that the Haikou bureau had relied on an irrelevant factor to rule that the teacher's death was not a work injury. The Haikou bureau said that the teacher had violated the school's prohibition against giving students tests at night; therefore, the teacher was not injured "during working hours on the job." The Court declared that the teacher's violation of school policy was irrelevant because the work injury regulations have no statutory exception for injuries suffered while violating a company policy or rule.

Key take-away points:

Even though the Supreme People's Court's ruling does not bind lower courts, most lower courts will find the Supreme People's Court's position highly persuasive when ruling in similar cases. As such, employers should be prepared for employee injuries suffered at home while working on the employer's behalf to be deemed as work injuries even if the employer does not allow the employee to work overtime from home. As flexible working policies become more common, employers should be aware of this work injury liability risk when implementing their flexible working policies.

Complaints arise over employers using cell phone location data against their employees

According to recent media reports in the Chinese press, public complaints are increasing over how employers are using cell phone location data in disciplinary proceedings against their employees.

Recent news reports have contained stories that are troubling to the public. In Shenyang, an employer fined an employee CNY 200 for making a side-trip to the housing fund management center to attend to a personal matter while out of the office for a work matter during working hours. In Dalian, an employer deducted the entire business trip allowance for an employee who visited Disneyland during the weekend of a business trip in Shanghai. In Shanxi, an employer fined an employee CNY 20 for reviewing Weibo posts for 10 minutes in the restroom during working hours. In all of these cases, the employers discovered the employees' locations by accessing the location data on company apps downloaded to the employees' cell phones as part of the employers' remote attendance management systems.

As more and more employers use these apps for their remote attendance management systems to manage employee attendance, overtime, business trips, etc. as a time- and cost-savings measure, more and more people feel the capture of the cell phone user's location data is an intrusion into their personal lives. Indeed, employers could face data privacy risks by using these apps and by accessing employee location data.

Courts have previously weighed in on how to view this data when employers use it as the basis to discipline employees. In cases handled in Jiangsu Province and Shanghai several years ago, courts have ruled termination for absenteeism to be illegal when the employers relied on data from their remote attendance management systems. The Jiangsu court held that the employer could not use the data from its remote attendance management system in a termination decision because the system was not formulated and adopted in accordance with the statutory employee consultation procedures. The Shanghai court found that the data from the remote attendance management system was unreliable since the employer could not refute the employee's claim that the cell phone was not working properly and therefore not recording location data accurately.

Key take-away points:

Employers should be cautious when adopting and using remote attendance management systems. In addition to potentially infringing an employee's data privacy rights, the employer faces risks when relying on the system's electronic records to discipline an employee. Therefore, every employer should consider measures to protect against these risks, such as consulting with employees before adopting a remote attendance management system, and ensuring the system only collects information when the employee is logged in during working hours so that the employer is not recording the employee's location 24/7.

Beijing court upholds termination for "major change in objective circumstances"

Recently in Beijing, the final instance court upheld a company's unilateral termination of an employee based on a major change in objective circumstances.

The company decided to eliminate its adhesive tape business line. As part of the restructuring, the company offered to transfer an employee whose position on the tape production line was being eliminated. During the consultation process, the employee tentatively agreed to transfer to the company's subsidiary to work as a room attendant in a conference center. But the employee rejected the new position's monthly salary, which was CNY 2,300, less than half the previous position's monthly salary of CNY 5,800. Because the company and employee could not reach an agreement on amending the employment contract, the company unilaterally terminated the employee, citing the elimination of its adhesive tape business line as a "major change in objective circumstances."

The first instance court agreed that the elimination of the adhesive tape business line constituted a major change in objective circumstances; therefore, the company had acted lawfully in attempting to transfer the employee to a new job position as part of the consultation process. However,

the first instance court held that the employee could not be unilaterally terminated for refusing to accept the reduced salary in the new job position.

On appeal, the final instance court reversed the lower court's decision that the termination was unlawful. The final instance court agreed that the elimination of the tape business line constituted a major change in objective circumstances. However, the final instance court disagreed that the company was required to maintain the same salary level in the new job position; the final instance court could find no support for this conclusion in the law. Therefore, the final instance court held that the company acted lawfully in unilaterally terminating the employee when the two parties could not agree to amend the employment contract at a reduced salary level.

Key take-away points:

Companies generally find it difficult under the law to terminate employees based on a major change in objective circumstances. The phrase "major change in objective circumstances" is usually interpreted to mean major restructuring, such as company relocation, asset sale, merger, or complete closure of a division or department within the company. Moreover, the Beijing High Court raised the bar even higher for these terminations with its 2017 opinion that further limited "major change in objective circumstances" to very narrow situations, such as force majeure (e.g., natural disaster), change in law or government policy, and change of the licensed business scope.

This case, however, indicates that at least some Beijing courts still accept internal corporate restructurings, such as the shutdown of an entire business unit, as a major change in objective circumstances. Thus, termination on this ground may be ruled lawful if the consultation procedure is followed, which entails offering an alternative job position, not necessarily of the same rank or pay, before proceeding with the termination.

Shanghai court invalidates employment contract signed after employee fabricated work experience

Recently, the Shanghai Pudong District People's Court issued a report on 10 typical labor dispute cases decided in 2017. Those cases cover employment contract disputes, non-compete provisions, work injury entitlements, etc.

In one case, the court ruled that an employment contract was invalid because the employee provided false statements about prior work experience during the hiring process.

The employee joined the company in November 2014. On the company's employment application and on the employee's CV, the employee listed prior work experience with two companies supposedly operating in the same industry as the hiring company. However, when the hiring company later researched the two companies, it found no government registration information for the two companies and therefore realized the two companies did not exist.

The company terminated the employment contract in January 2015 on the grounds that the employment contract was invalid. The company believed the employment contract was invalid because the company had intended to hire

an employee with appropriate industry-related work experience but was tricked into hiring an employee without that experience based on the employee's fraudulent work experience claims. In addition to terminating the contract, the company also demanded the employee return all salary and bonuses paid. The employee disputed the termination and the reimbursement demand.

In February 2017, the Shanghai First Intermediate Court ruled in favor of the company on the contract invalidation claim. The court held that the employment contract was invalid because the false information provided by the employee had induced the company to sign an employment contract contrary to the company's true intent. However, the court rejected the company's claim for reimbursement of salary and bonuses. The court held that the employee should be paid for services rendered to the company even if those services were rendered under an invalid employment contract.

Key take-away points:

Employers should conduct basic due diligence when hiring employees to avoid future disputes. For executive-level roles, employers should conduct thorough background checks to verify key employment information provided by the candidate before making an official offer.

Although employers may terminate employees who provide false information during the hiring process if the misleading information was material to the hiring decision, they likely cannot reclaim salary and other compensation already paid.

Beijing court rules termination of pregnant employee during probation period unlawful

In March 2018, the Beijing Chaoyang District Court ruled that an employer unlawfully terminated a pregnant employee for her failure to meet the employment conditions during the probation period.

After being informed of the employee's pregnancy, the employer unilaterally changed her job position. Less than a month after the change, the employer terminated the employee for her failure to sign any new customers during the probation period. The employee challenged the termination in court.

The court held that the termination was unlawful because an employer may not summarily dismiss a pregnant employee for failure to meet the employment conditions during the probation period. The judge further commented that the employer may reasonably adjust the pregnant employee's position or change the pregnant employee's job duties if the employee is incompetent in her current position. The pregnant employee can be immediately terminated only if she commits serious misconduct.

The court's ruling is consistent with local Beijing court meeting minutes, which extend greater protections to certain protected classes of employees during the probation period than national law. National law does not prohibit termination during probation of sick employees who are in their statutory medical treatment period or female employees during the pregnancy, maternity or nursing periods, whereas the local Beijing court meeting minutes say that these protected employees may not be unilaterally terminated for failure to meet the employment conditions during the probation period unless

the employee — due to personal reasons — fails to satisfy a work quota listed in the recruitment conditions for the job position.

Key take-away points:

Employers in Beijing should follow the local court meeting minutes when managing terminations. Accordingly, if a protected employee does not meet performance expectations during the probation period, the employer may adjust the employee's job position or responsibilities, preferably through a mutual negotiation process and with the employee's consent. Otherwise, termination of the employee would expose the employer to wrongful termination risks.

Jiangsu court finds employer guilty of evading wage payments

The Jianhu County Court in Jiangsu Province found an individual guilty of refusing to pay CNY 520,000 in wages to more than 50 employees.

The individual was a construction contractor who hired more than 50 employees to work on a construction project. The contractor delayed wage payments to the employees and instead issued debt notes for CNY 520,000. The local labor bureau issued a rectification letter and set a deadline for the contractor to pay the late wages. When the deadline passed without a payment, the local labor bureau contacted the contractor to schedule a meeting. The contractor refused to cooperate and fled Jianhu County.

After the contractor was found and arrested, a lawsuit was filed in the Jianhu County Court. The court ruled that the contractor had refused to obey the labor bureau order and had evaded the wage payments by becoming a fugitive. The court further ruled that the unpaid wage amount was equal to the debt note total. As the unpaid wages were relatively high, the contractor had violated the *PRC Criminal Law* and was guilty of refusing to pay wages. The contractor was sentenced to two years imprisonment and fined CNY 50,000.

Key take-away points:

Criminal thresholds for the refusal to pay wages vary depending on location. For example, in Guangzhou and Shenzhen, the employer commits a criminal act by refusing to pay: (1) one employee for at least three months a total wage amount of at least CNY 20,000; or (2) more than ten employees for any time period a total wage amount of at least CNY 100,000. Based on the potential for severe criminal penalties, employers should ensure full and timely payment of wages to all employees and keep payroll records for two years as required by statutory record-keeping requirements.

Shanghai court uses proportionality principle to reduce employer's recovery of damages caused by employee's wilful misconduct

Recently, the Shanghai Jiading District Court upheld an employer's claim for damages caused by an employee's wilful misconduct, but the court granted a lower recovery amount based on the proportionality principle. The court decided that reduced damages were warranted under the proportionality

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principle because the employer had failed to establish procedures to prevent the employee's misconduct.

The employee was a manager at the employer's company — a real estate agency. In order to facilitate a property sale, the employee promised to help a buyer skirt property ownership restrictions. To qualify to buy a house in Shanghai, the buyer was required, among other things, to have contributed to social insurance in Shanghai for a certain number of months. As the buyer had not made these contributions, the employee promised to help the buyer make back payments to the social insurance fund. The buyer paid the employee CNY 10,000 for the social insurance payments and signed the real estate purchase agreement with the seller. However, the property sale was eventually blocked because of the ownership restrictions. The buyer sued the employer and received CNY 70,000 in damages.

The employer later sued the employee. The court held that the employee had wrongfully promised the buyer that social insurance back payments could be made even though such back payments would not help with the property ownership restrictions. This wrongful promise caused the buyer to sign the purchase agreement and led to losses for both the buyer and the employer. Furthermore, the employee personally took CNY 10,000 from the buyer without providing proof that it was paid to the company or to the social insurance fund. Therefore, the court ruled that the employee was obliged to compensate the employer for the losses caused by the employee's wilful misconduct in breach of the employer's company policy.

However, the court further noted that the employer was responsible for ensuring its business was compliant with the law, including being responsible for providing necessary training to employees and for establishing procedural safeguards to prevent non-compliant behavior. The court found that the employer had failed to meet these managerial responsibilities; therefore, it was unreasonable for the employee to bear all the losses.

The court applied the proportionality principle and determined the employee should be liable for CNY 20,000 (around 30% of the employer's total losses) based on the employee's vulnerable position and on the employer's better financial position.

Key take-away points:

This case shows that courts will evaluate both the employee's and the employer's fault when determining liability even if the employee engaged in wilful misconduct. To protect against liability for an employee's wilful misconduct, employers should establish sound procedures and provide necessary employee training to prove that the employer has taken all necessary measures to prevent employee misconduct.

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